More specifically, the second page of the application discloses that the present invention relates to a method to improve the instantisation process, especially with regard to good wettability with water or aqueous liquids, respectively, i.e. a wettability within shortest time, and that this is achieved by a method for the instantisation of powders, wherein lecithin and alginate in water or an aqueous liquid are sprayed onto the powder particles and are subsequently dried. As is indicated, for example, on the fourth page of the application, instantisation has to do with giving the powders instant behavior.

Although the Examiner refers to drying the powders, the claims actually recite that the lecithin and alginate are dried rather than that the powders are dried.

In rejecting claims 1, 2, 4 and 5 under 35 USC 103 as being obvious over the newly-cited Cajigas reference in view of the Fitzpatrick reference, the Examiner refers to a statement in Cajigas (column 6, line 26) that lecithin acts as an agent to wet or hydrate the whey protein absorption layer around the casein, and she contends that such a statement makes it obvious that the lecithin is applied as a liquid.

Actually, the statement in Cajigas that lecithin acts as an agent to wet or hydrate means that the lecithin helps other liquids wet or hydrate the whey protein absorption layer, rather than meaning that the lecithin itself is applied wet to the whey protein absorption layer. The Encyclopedia Britannica defines a "wetting agent" as a chemical substance that increases the spreading and penetrating properties of a liquid by lowering its surface tension—that is, the tendency of its molecules to adhere to each other. Thus, the statement in Cajigas that lecithin acts as an agent to wet or hydrate does not render it obvious that the lecithin itself is applied wet to the whey protein absorption layer. Accordingly, Cajigas does not disclose that the lecithin

itself is applied wet.

Furthermore, the Examiner contends that one of ordinary skill would have been motivated by the teaching of Fitzpatrick to apply both the lecithin and alginate of Cajigas by combining with water and spraying the components onto the powder particles in efforts to control the viscosity of the final product.

However, the applicants point out that Fitzpatrick actually teaches away from using the process of Fitzpatrick with the invention of Cajigas. More specifically, Cajigas relates to instant yogurt, whereas Fitzpatrick relates to the production of a full cream milk powder. In this regard, Fitzpatrick discloses that milk powders that contain a low level of fat, by which is meant less than about 10%, can normally be made instant by a procedure in which the powder is made to form into granules by wetting and then drying. Fitzpatrick's process is for milk powders with a fat content in excess of 10%, which cannot be made instant by a procedure in which the powder is made to form into granules by wetting and then drying (page 1, lines 5-21). In contrast, Cajigas discloses that his invention provides an instant powdered composition comprising a mixture of deactivated yogurt powder, Lactobacillus culture, a gelling agent, a hydrocolloid gum, and a food acidulent, and also provides a process for preparing the composition (column 2, lines 58-66). Yogurt powder typically has a fat content of 1.25 % – 2.0 %. Submitted herewith is a copy of "Yogurt Powder Ingredients" from the U.S. Dairy Export Council indicating that yogurt powder typically has a fat content of 1.25 % – 2.0 %.

Since Fitzpatrick discloses that milk powders that contain a low level of fat, by which is meant less than about 10%, can normally be made instant without the Fitzpatrick process, and that the Fitzpatrick process is for milk powders with a fat content in excess of 10%, Fitzpatrick does

not provide any motivation to apply either the lecithin of Cajigas or alginate by combining with water and spraying the components onto the powder particles in efforts to control the viscosity of the final product. Instead, Fitzpatrick teaches there is no need to use his process for powders having a fat content of less than about 10%. Thus, Fitzpatrick teaches away from using his process for yogurt powder, which typically has a fat content of 1.25 % – 2.0 %, and it would not have been obvious to the Fitzpatrick process with the yogurt powder of Cajigas.

With respect to the rejection of claims 4 and 5, the Examiner contends that it would have been obvious to use the method of Cajigas with coconut milk.

The Cajigas reference, which is titled "Instant Yogurt Composition", does not contemplate the use of its invention with coconut milk. Everything in the Cajigas disclosure involves milk. In this respect, Cajigas discloses:

"Yogurt is a form of fermented milk curdled to a smooth, creamy or custard-like consistency by lactic acid-producing microorganisms. The production of natural yogurt entails the implant of a beneficial culture of Lactobacillus bulgaricus and sometimes Lactobacillus acidophilus in milk which is then allowed to incubate until these particular species of bacilli establish the proper pH in the milk, after which the milk is chilled to inhibit growth of undesirable microflora." (column 1, lines 23-31);

"Yogurt is believed to have medicinal value in the control of intestinal fermentation in that it contributes bacteria which establish themselves in the lower intestine and predominate over putrefactive types. Because of this characteristic, yogurt is often prescribed to patients who are required to take large doses of antibiotic drugs. These drugs, as a side effect, act to kill beneficial intestinal bacteria, and it is often necessary, therefore, to replenish such bacteria."

(column 1, lines 56-64); and

"The instant composition also contains a food acidulent which is added in order to provide the acidic taste typical of yogurt." (column 3, lines 48-49); "A preferred food acidulent is acid whey." (column 3, line 54); "Whey is the part of milk left over after manufacturing cheese." (column 3, lines 64-65).

There is no hint in Cajigas that the invention it discloses could be applied to coconut milk.

The Internet webpage reference cited by the Examiner, *What is Coconut Milk*, with an effective date of November 2010, is not prior art with respect to the present application. Thus, its disclosure cannot be used to reject claims of the present application. Furthermore, even if its disclosure could be used, it contains no suggestion to indicate to one of ordinary skill that it would have been obvious to use the Cajigas disclosure with coconut milk. There is nothing in the combination of Cajigas and *What is Coconut Milk* to suggest the desirability of using the Cajigas disclosure with coconut milk. The applicants refer to *In re Imperato*, 179 USPQ 730 (CCPA 1973), in which Chief Judge Markey said: "However, the fact that those disclosures *can* be combined does not make the combination obvious unless the art also contains something to suggest the desirability of the combination" (emphasis in the original).

The Examiner's description of the health benefits of coconut milk are not reasons why it would have been obvious to use the Cajigas disclosure with coconut milk. Without valid supportive reasoning as to why the combination of references would have been obvious, the contention that the combination of references would have been obvious is an unsupported conclusion. It is submitted that more than a description of health benefits of coconut milk, such

as that provided by the Examiner, is needed to set forth a *prima facie* case of obviousness. Instead, some valid supportive reasoning why the combination of references would have been obvious is required. In this regard, the court in *In re Kahn*, 78 USPQ2d 1329 (Fed. Cir. 2006) stated: "[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." This recitation by the Federal Circuit was cited with approval by the US Supreme Court in the KSR decision (*KSR Int'l Co. v. Teleflex, Inc.*, 82 USPQ2d 1385 (2007)). Furthermore, the appellant points out that "[T]he initial burden of establishing a *prima facie* basis to deny patentability to a claimed invention rests upon the examiner." *Ex parte Levy,* 17 USPQ 2d 1461, 1464 (BPAI 1990); *In re Piasecki*, 223 USPQ 785 (Fed. Cir. 1984).

Moreover, in *Tec Air Inc. v. Denso Manufacturing Michigan Inc.*, 52 USPQ2d 1294 (Fed. Cir. 1999), the court said: "To establish a *prima facie* case of obviousness, Denso must show "some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references." In the present case, there is no objective teaching in the prior art, or in *What is Coconut Milk*, or in that knowledge generally available to one of ordinary skill in the art, that would lead that individual to use the Cajigas disclosure with coconut milk.

The fact suggested by the Examiner, that Cajigas does not teach against coconut milk, is not the standard for obviousness. There must be some suggestion in the prior art to use the Cajigas process with coconut milk.

In view of the foregoing, it is submitted that all of the claims are allowable and that the

application is in condition for allowance. An early notice to that effect is respectfully requested.

The Commissioner is hereby authorized to charge any deficiency in fees or to credit any overpayment in fees to Attorney's Deposit Account No. 50-0562.

Respectfully submitted,

Date: 3-28-11

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John P. Shannon

Yogurt Powder Ingredients

Yogurt powders are becoming increasingly popular ingredients for a variety of applications. They add a unique dairy flavor and impart a "nutritious" connotation to a wide variety of food applications.

Although there is a standard of identity for yogurt, currently there is no standard of identity for yogurt powder in the U.S. Traditionally, yogurt powder has been manufactured by adding cultures to nonfat milk, allowing the product to reach a specified pH, and then drying the product.

There are also a number of blended dairy ingredients that provide similar flavor and functionality to traditional yogurt powder. These blended yogurt powders may contain some combination of the following ingredients: cultured nonfat milk, cultured whey, cultured whey protein concentrate, cultured dairy solids, nonfat dry milk, whey powder, lactic acid, and natural and artificial flavors. Silicon dioxide may be added as an anti-caking agent. There will be minor variations in flavor and functionality between traditional yogurt powders, depending on the cultures used and pH achieved before drying. Blended cultured dairy solids may exhibit even greater variability, so food and beverage manufacturers are encouraged to test individual yogurt powders to select the optimal ingredient for their specific application.

Typical Composition of Yogurt Powders (%)

Ingredient	Moisture	Fat	Protein	Lactose	Ash
Yogurt Powder	3.0 – 5.0	1.25 – 2.0	33.0 – 36.0	50.0 – 51.5	7.0 – 8.0
Cultured Dairy Solids	3.0 – 5.0	Trace – 2.0	22.0 – 33.0	52.0 – 66.7	7.0 – 8.0

Applications and Beneficial Features

Yogurt powders add a unique dairy flavor to food applications, including beverages, confections and dips. They can be used in place of fresh yogurt for beverages and dips. They are frequently used in the manufacture of a confectionery coating for pretzels, dried fruit, cereal and other snack items. They also can be applied topically as a coating for cereals and snacks.

Physical Properties

pH: The pH of rehydrated yogurt powders is typically in the range of 4.7 to 5.1.

Titratable Acidity: The titratable acidity of yogurt powders is typically in the range of 5.8 percent to 7.4 percent. Titratable acidity measures the lactic acid developed as a result of the metabolic breakdown of lactose.

Color: Yogurt powder ranges in color from off-white to pale yellow color. Rehydrated yogurt powders range in color from a milky white to a pale opaque yellow.